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SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Dmitri Vallerveich TATARINOV,

Petitioner,

vs.

Superior Court of the State of California,
County of San Diego; Office of the Chief
Counsel, Dept. of Homeland Security; U.S.
Attorney, Southern District; ICE Detention &
Removal Unit

Respondents.

Civil No. 07cv2033 (NLS)

USICE No. A72 779 308

FIRST AMENDED PETITION FOR WRIT
OF HABEAS CORPUS UNDER 28 U.S.C.
§2241

CP

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UNITED STATES DISTRICT COURT
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INTRODUCTION

Mr. Tatarinov moves to reinstate his post-conviction nonstatutory motion to vacate a judgment entered after plea, or vacate the verdict from the Superior Court of the State of California case number SCD 135946 on the grounds that he received ineffective assistance counsel based on defense counsel's conflict of interest rendering these critical stages constitutionally inadequate, in violation of the state and federal rights to the effective assistance of counsel, due process, and a fair trial. The collateral consequences of the conviction are the deportation of Mr. Tatarinov and as such the case and controversy still exist.

The Supreme Court has held that it possesses jurisdiction under 28 U.S.C. §2241 to grant on “original” writ of habeas corpus to state or federal prisoners in exceptional cases when there are procedural or jurisdictional obstacles under U.S.C. §2254 or 2255. Under 28 U.S.C. §2255, “If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.” Likewise under U.S.C. §2254, a petition may be filed on “behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” Mr. Tatarinov has completed the California state sentencing imposed upon him by this conviction, but, because of the collateral consequences of deportation, he is being detained under Federal custody by Immigration Customs Enforcement. He respectfully moves that the court grant his U.S.C. §2241 writ and vacate the judgment based upon the violation of his constitutional rights.

JURISDICTION

The guarantees of the Sixth Amendment entitle defendants in criminal cases the right to effective assistance of counsel, which includes the right to conflict-free representation. *United States v. Mett*, 65 F.3d 1531 (9th cir. 1995.)

A Federal court does not have subject matter jurisdiction over a habeas petition unless the petitioner is “in custody” within the meaning of 28 U.S.C. §2254(a). Although Mr. Tatarinov is no longer in state custody or state probation

1 from this conviction, Mr. Tatarinov is currently in custody by the Immigration
2 and Customs Enforcement Detention and Removal Center located in San Diego,
3 CA. Mr. Tatarinov was found removable as an alien convicted of a crime
4 involving moral turpitude within five years of admission pursuant to section
5 237(a)(2)(A)(i) of the Immigration and Nationality Act, as well as an alien
6 convicted of two or more crimes involving moral turpitude from this conviction.
7 Excerpts of Record, pp. 115-117. In habeas corpus proceedings attacking a
8 criminal conviction, the case or controversy requirement normally is satisfied,
9 even after all potential custody has expired. Habeas jurisdiction is therefore
10 proper.
11

12 MOOTNESS

13 Collateral consequences from a state judgment or order may used to
14 establish that the case is not moot. *Carafas v. LaVallee*, 391 U.S. 234, 238
15 (1968). Such consequences include the "inability to vote, engage in certain
16 businesses, hold public office, or serve as a juror." (Id. At 237-238). A
17 conviction usable in a "persistent felony offender" prosecution is a collateral
18 consequence that defeats any mootness objections when a habeas petitioner is no
19 longer in custody. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985). Here, Mr.
20 Tatarinov overcomes mootness because under California's "Three Strikes" law,
21 Mr. Tatarinov's 484/666 shop lifting conviction can be used to increase the
22 punishment for subsequent felonies. Likewise, the conviction resulted in the
23 serious collateral consequence of affecting his immigration status making him
24 removable as an alien convicted of a crime involving moral turpitude within five
25 years of admission pursuant to section 237(a)(2)(A)(i) of the Immigration and
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1 Nationality Act, as well as an alien convicted of two or more crimes involving
2 moral turpitude. Excerpts of Record, pp. 115-117.

3
4 STATEMENT OF THE CASE

5 On October 19, 1998 Mr. Tatarinov pled guilty to shop lifting. The charge
6 was upgraded to a felony due to a prior robbery conviction (SCD 119330) and he
7 was charged under California Penal Code Section 484/666. Mr. Tatarinov was
8 sentenced to 34 days of custody, imposition of the sentence was suspended and
9 he was placed on probation for five years. Attorney Verhovskoy (Verhovskoy)
10 represented Mr. Tatarinov and advised Mr. Tatarinov to plead guilty.

11 Prior to that conviction Mr. Tatarinov was charged in the California
12 Superior Court, case number SCD 119330, with one count of second degree
13 robbery in violation of California Penal Code section 211, and one count of
14 interfering with a police officer in violation of California Penal Code section
15 148. A jury convicted Mr. Tatarinov of robbery but acquitted him of violation
16 section 148 on August 12, 1996. The superior court granted probation. Excerpts
17 of Record, p. 77.

18
19 Mr. Tatarinov filed a timely notice of appeal to the California Court of
20 Appeal. The appeal was subsequently dismissed on April 28, 1997 after Mr.
21 Tatarinov's retained attorney, Verhovskoy, failed to file a written brief. Excerpts
22 of Record, p. 10. Verhovskoy thereafter intentionally misled Mr. Tatarinov and
23 his wife about the status of the appeal. Excerpts of Record, pp. 2-4, 6-7, 77-78.
24 Finally, Mr. Tatarinov's wife learned through her own efforts that the appeal had
25 been dismissed. Verhovskoy then filed an unsuccessful motion to reinstate the
26 appeal. By then, more than two years had passed since the appeal's dismissal.
27 Excerpts of Record, pp. 3, 78.
28

1 In December 2000 Verhovskoy sent Mr. Tatarinov a letter terminating his
2 representation. Excerpts of Record, pp. 4, 30, 78. The California State Bar
3 subsequently suspended Verhovskoy and commenced disciplinary proceedings
4 against him. Excerpts of Record, pp. 78, 131-134.
5

6 On October 23, 2006 Defendant filed a nonstatutory motion to vacate a
7 plea entered on grounds of ineffective assistance of counsel in the Superior Court
8 of California, County of San Diego. Excerpts of Record, pp. 107-126. The
9 Honorable Judge Jeffrey F. Fraser denied the motion ruling that the trial court
10 lacked jurisdiction to vacate the judgment. On November 2, 2006, a notice of
11 appeal was filed with Court of Appeal - State of California. Excerpts of Record,
12 p. 127. On June 1, 2007 the appeal was dismissed after Respondent's motion to
13 dismiss based on lack of jurisdiction. Excerpts of Record, p. 136. On June 12,
14 2007 a Petition for Review was filed in the Supreme Court of California. On
15 September 12, 2007 the petition for review was denied. Excerpts of Record, p.
16 137.
17

18 STATEMENT OF FACTS

19 In December 2000, Verhovskoy continued to represent Mr. Tatarinov on
20 an immigration matter. Verhovskoy had recently asked for a payment of \$500,
21 which was promptly paid. On December 24, 2000, Mr. Tatarinov received a
22 letter from Verhovskoy. It stated Verhovskoy would no longer represent Mr.
23 Tatarinov, and advised him to retain other counsel. The letter provided no
24 explanation. Excerpts of Record, pp. 4, 30. On January 19, 2001, Mr. Tatarinov
25 received a notice from the California State Bar indicating Verhovskoy was
26 "suspended from the practice of law in the State of California for a period of
27 sixty (60) days." Mr. Tatarinov retained another attorney to represent him in the
28

1 immigration matter. Excerpts of Record, pp. 4, 115.

2
3 On January 28, 2000, Mr. Tatarinov filed a Complaint Form with The
4 State Bar of California regarding Verhovskoy's failure to file the appeal and
5 nonperformance in other legal matters. Excerpts of Record, pp. 128-130. The
6 State Bar of California assigned case number 01-O-00503 and the disciplinary
7 case settled on September 30, 2002. By failing to prepare and file appellate briefs
8 and not notifying Mr. Tatarinov of his actions, Verhovskoy was found to have
9 failed "to perform legal services with competence, in violation of Rules of
10 Professional Conduct, rule 3-110(A)." Excerpts of Record, pp. 131-134

11 On January 6, 1995, Mr. Tatarinov was granted Conditional Permanent
12 Resident Status based upon his marriage. In December 1996, he filed a petition
13 to remove that status. That application was not adjudicated until several years
14 later. In fact, it was not until Mr. Tatarinov was in Removal Proceedings that the
15 Immigration and Naturalization Service decided to remove the condition, making
16 him a Lawful Permanent Resident. As a result of his convictions, Mr. Tatarinov
17 was placed in removal proceedings on June 24, 1998. The Immigration Judge
18 found him removable as an alien convicted of a crime involving moral turpitude
19 within five years of admission pursuant to section 237(a)(2)(A)(i) of the
20 Immigration and Nationality Act, as well as an alien convicted of two or more
21 crimes involving moral turpitude. Excerpts of Record, pp. 115-117.

22 ARGUMENTS

23
24 Attorney's conduct resulted in an irreconcilable conflict of interest
25 between him and his client violating the Sixth Amendment right to
26 conflict-free representation.

27 The guarantees of the Sixth Amendment entitle defendants in criminal
28

1 cases the right to effective assistance of counsel, which includes the right to
2 conflict-free representation. *United States v. Mett*, 65 F.3d 1531 (9th cir. 1995.)
3 “Where a constitutional right to counsel exists, our Sixth Amendment cases hold
4 that there is a correlative right to representation that is free from conflicts of
5 interest.” *Wood v. Georgia*, 450 U.S. 262,271 (1981). “The defense counsel had
6 a duty to alert the court to the existence of conflicts and to assist the court in
7 determining whether the conflict has been properly waived, if a waiver exists.”
8 *People v. Mroczko*, 35 C3d 86 (1983).

9
10 The possibility of a conflict of interest is insufficient to impugn a criminal
11 conviction. In order to establish a violation of the Sixth Amendment, a defendant
12 must show that an actual conflict of interest adversely affected his lawyer's
13 performance. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

14 Verhovskoy had a duty to inform the court of the prior trial, SCD 119330,
15 his failure to file the appellate brief and his deceit regarding the appeal.
16 Verhovskoy was aware that his representation in the prior case was incompetent.
17 “In criminal cases, an attorney’s representation of a former client may preclude
18 renewed representation of that client in a new matter if the prior representation
19 resulted in the client’s conviction. Reason: The client may want to attack the
20 prior conviction on the ground of incompetent representation.” (*People v. Bailey*,
21 (1992) 9 CA4th 1252, 1254-1255, 12CR2d 339, 340-341 – permitting trial
22 counsel to represent same client on appeal puts the counsel in “the untenable
23 position of urging his own incompetency”; San Diego Bar Ass’n Form. Opn.
24 1995-1-lawyer representing a former client on new matter involving “three
25 strikes” violation must decline representation if prior representation deemed
26 inadequate.) California Practice Guide Professional Responsibility 2005, 6-142
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[6:900].

Verhovskoy's continued representation of Mr. Tatarinov after failing to file the SCD 119330 appellate brief is an "actual" conflict. The instant Verhovskoy failed to file the appellate brief per Mr. Tatarinov's request, April 28, 1997, Verhovskoy created an actual conflict between him and Mr. Tatarinov. Verhovskoy hid the fact he failed to file the appellate brief by lying to Mr. Tatarinov about the status of the appeal. From April 1997 through December 2000 Verhovskoy kept Mr. Tatarinov as a paying client by lies and misrepresentations. It was only after the California State Bar, on another matter, suspended his license that Verhovskoy was forced to terminate the relationship. "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and the defendant's interests diverge with respect to a material factual or legal issue or to a course of action." *United States v. Levy*, 25 F3d 146 (2d Cir. 1994.) There is a "presumption of prejudice where conflict is actual." California Practice Guide Professional Responsibility 2005, 6-138 [6:846]. "An actual conflict of interest on the part of defense counsel can constitute ineffective assistance of counsel and mandate reversal of a criminal conviction or sentence." California Practice Guide Professional Responsibility 2005, 6-133 [6:820].

II. Attorney's misconduct in permitting defendant's state appeal in another case to be dismissed, in lying about the status of the dismissed appeal, and representing that nothing could be done to revive the appeal, requires a finding of counsel's conflict of interest resulting in ineffective assistance of counsel violating the Due Process Clause of the Fourteenth Amendment.

1 *Douglas v. California*, 372 U.S. 353 (1963), held that the Fourteenth
2 Amendment guarantees a criminal defendant the right to counsel on his first
3 appeal as of right. The U.S. Supreme Court later held "The Due Process Clause
4 of the Fourteenth Amendment guarantees a criminal defendant the effective
5 assistance of counsel on his first appeal as of right."

6
7 Mr. Tatarinov retained Verhovskoy to file his appeal. Verhovskoy failed
8 to file the appellate brief causing the dismissal of the appeal and misled Mr.
9 Tatarinov for several years regarding the status of the appeal. After Mr.
10 Tatarinov learned that the appeal had been dismissed, Verhovskoy continued to
11 lie, deceive and provide misinformation to Mr. Tatarinov hiding the fact he had
12 acted incompetently. Verhovskoy's failure to file a brief resulted in the dismissal
13 of Mr. Tatarinov's appeal, violating the Fourteenth Amendment Due Process
14 clause guaranteeing that Mr. Tatarinov have effective assistance of counsel on
15 his first appeal as of right and as such, created an actual conflict between the
16 Defendant and Verhovskoy violating his rights in the later case to conflict free
17 representation.

18
19 III. Attorney's misconduct in permitting defendant's state appeal in another
20 case to be dismissed, in lying about the status of the dismissed appeal,
21 failure to file a "Wende brief" to protect defendant's rights, and
22 representing that nothing could be done to revive the appeal, requires a
23 finding of counsel's conflict of interest resulting in ineffective assistance
24 of counsel violating the Sixth Amendment guarantee that a defendant has
25 the assistance necessary to justify reliance on the outcome of the
26 proceeding.

27 Verhovskoy failed to honor Mr. Tatarinov's request to file an appeal by
28

1 not submitting the brief. *Rodriquez v. U.S.*, 395 U.S. 327 (1969), held that a
2 lawyer who disregards a defendant's specific instructions to file a notice of
3 appeal acts in a professionally unreasonable manner and "those whose right to
4 appeal has been frustrated should be treated exactly like any other appellants;
5 they should not be given an additional hurdle to clear just because their rights
6 were violated at some earlier stage in the proceedings. The petitioner in the
7 *Rodriquez* case was of "Mexican descent and that his knowledge of the English
8 language was limited. He further contended that his retained counsel had
9 fraudulently deprived him of his right to appeal." In Mr. Tatarinov's case, we
10 have a Russian immigrant who specifically retained a Russian-speaking lawyer
11 as Mr. Tatarinov's knowledge of the English language was limited. Although
12 Verhovskoy filed the notice of appeal, he did not file the brief, failing to perfect
13 an appeal on behalf of Mr. Tatarinov. This failure to perfect the appeal and lying
14 to Mr. Tatarinov regarding the appeal "fraudulently deprived" Mr. Tatarinov of
15 his appeal creating an actual conflict of interest which later deprived Mr.
16 Tatarinov of conflict free representation.
17

18
19 Following the *Rodriquez* ruling, *Strickland v. Washington*, 466 U.S. 668
20 (1984) provided a framework for evaluating counsel's performance. Under
21 *Strickland* "The Sixth Amendment right to counsel is the right to the effective
22 assistance of counsel, and the benchmark for judging any claim of
23 ineffectiveness must be whether counsel's conduct so undermined the proper
24 functioning of the adversarial process that the trial cannot be relied on as having
25 produced a just result." Verhovskoy's conduct of failing to prepare and file the
26 appellate brief, and lying to the Defendant was of such deficient performance that
27 Mr. Tatarinov was denied his right to conflict free representation. "In certain
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1 Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial
2 of the assistance of counsel altogether is legally presumed to result in prejudice.”
3 *Strickland v. Washington*, 466 U.S. 668 (1984). “The complete denial of
4 counsel during a critical stage of a judicial proceeding, however, mandates a
5 presumption of prejudice because “the adversary process itself” has been
6 rendered “presumptively unreliable.”“ *United States v. Cronin*, 466 U.S. 648,
7 659 (1984).
8

9 IV. The motion to vacate is made on grounds that could not have been raised
10 on direct appeal from the judgment itself and is not a duplicate appeal
11 from the judgment itself.

12 Under California law, a defendant may appeal from an order made after
13 judgment, affecting the substantial rights of the defendant. Penal Code §1237 (a)
14 &(b). An appeal from a post-judgment motion to vacate a guilty plea based on a
15 claim of ineffective assistance of counsel will be appealable since the basis for
16 the claim is generally not contained in the record and could not have been raised
17 on direct appeal. This is the “silent record exception” - an appeal is allowed
18 where the record on appeal from the judgment would not have shown the error
19 sought to be asserted. *Verhovskoy’s* conflict of interest constitutes ineffective
20 assistance of counsel. *Rodriguez v. U.S.*, 395 U.S. 327 (1969), “a lawyer who
21 disregards a defendant’s specific instructions to file a notice of appeal acts in a
22 professionally unreasonable manner.”
23

24 As a result of his conviction Mr. Tatarinov was found to be removable as
25 an alien convicted of a crime of moral turpitude and is being deported. As such,
26 the ruling denying a motion to vacate judgment would qualify based upon the
27 violation of Mr. Tatarinov’s Sixth and Fourteenth Amendment rights by the
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1 actions of Verhovskoy as an order after judgment affecting Mr. Tatarinov's
2 substantial rights and is therefore appealable.

3
4 The Court of Appeal - State of California, Fourth Appellate District,
5 Division One granted Respondent's motion to dismiss. The Respondent's
6 motion stated that the "trial court lacked jurisdiction," and therefore the appeal
7 was from an "unappealable order." In *People v Banks*, 53 Cal.2d 370 (1959), the
8 court exercised its inherent power to accept an appeal from an apparently
9 unappealable order denying a post-judgment motion to vacate a guilty plea
10 because the defendant raised an important constitutional question of first
11 impression.

12 For every constitutional violation there must be a remedy. "Fundamental
13 jurisdictional defects, like constitutional defects, do not become irremediable
14 when a judgment of conviction becomes final without appeal (or even after
15 affirmance on appeal)." *Mooney v. Holohan*, 294 US 103 (1935). California
16 courts must entertain nonstatutory motions to invalidate particular stages of a
17 criminal case, even entire criminal convictions, on constitutional grounds. This
18 rule – that constitutional violations must find a remedy even if no statute
19 provides one – has been specifically applied to claims of ineffective counsel.
20 *Murguia v. Municipal Court*, 15 Cal.3d 286, 124 (1975); *People v. Fosselman*,
21 33 Cal.3d 572, 189 (1983). The court therefore has inherent authority to grant a
22 post-judgment motion to vacate a judgment when the constitutional rights of the
23 accused have been violated.

24
25 V. This motion is timely filed as the substantial rights of the defendant are
26 adversely affected by the immigration proceedings defendant is facing.
27 California Penal Code Section 1237, provides that a defendant may appeal
28

1 from "a final judgment of conviction (§1237, subd. (a)) or from "any order made
2 after judgment, affecting the substantial rights of the party" (§1237, subd. (b)).

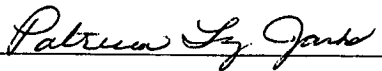
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4 This permits an appeal from any post judgment order that affects the "substantial
5 rights" of the defendant, the right to appeal is limited by the qualification that,
6 ordinarily, no appeal lies from an order denying a motion to vacate a judgment of
7 conviction on a ground which could have been reviewed on appeal from the
8 judgment." Mr. Tatarinov's nonstatutory motion to vacate brought in the San
9 Diego Superior Court is based on ineffective assistance of counsel and does not
10 address grounds that would have been reviewed on appeal.

11 There is no time limit in which the Section 1237 motion may be made.
12 Mr. Tatarinov has been in Removal Proceedings with the Immigration and
13 Naturalization Service proceedings since June 24, 1998. On February 9, 2007
14 the United States Court of Appeals denied his Petition and he was ordered to
15 surrender to the nearest Immigration and Customs Enforcement, Detention and
16 Removal Office by March 6, 2007. Mr. Tatarinov is currently in custody with
17 Immigration Customs Enforcement awaiting deportation stemming from the
18 conviction in this case. "[A] motion is timely if brought within a reasonable
19 time after the conviction actually 'may have' such consequences." *People v.*
20 *Superior Court (Zamudio)*, (2000) 23 Cal.4th 183. Therefore, the post-
21 conviction nonstatutory motion to vacate a judgment entered after court trial on
22 grounds of ineffective assistance of counsel was timely as the actual collateral
23 consequences of his conviction are now being realized.
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CONCLUSION

The consequences of Mr. Tatarinov's failure to receive conflict free and competent representation are a reversal of the conviction and for this reason, Mr. Tatarinov asks this Court to grant his petition under USC §2241 to vacate the judgment entered on grounds of ineffective assistance of counsel based on defense counsel's actual conflict of interest resulting in violations of Mr. Tatarinov's rights under the Sixth and Fourteenth Amendments.

Respectfully submitted,



Patricia Lynn Jacks

Attorney for Petitioner

Certificate of Compliance Pursuant to Fed. R. App. P.
32(a)(7)(C) and Circuit Rule 32-1 for
DMITRI VALLERVEICH TATARINOV, Petitioner

The brief is proportionately spaced, has a typeface of 14 points or more and
contains 4,324 words.



Patricia Lynn Jacks

Attorney for Petitioner